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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/748,243	12/31/2003	Robert B. DeVries	06530.0295	6999
22852	7590	11/04/2005	EXAMINER	
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413			KASZTEJNA, MATTHEW JOHN	
		ART UNIT	PAPER NUMBER	
		3739		

DATE MAILED: 11/04/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/748,243	DEVRIES ET AL.
	Examiner Matthew J. Kasztejna	Art Unit 3739

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 20 October 2005.
- 2a) This action is FINAL.                  2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-17 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 1/13/05 is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | Paper No(s)/Mail Date. _____.   |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>8/20/04, 6/23/05</u> . | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
|   | 6) <input type="checkbox"/> Other: _____.                                   |

## DETAILED ACTION

### ***Election/Restrictions***

Applicant's election with traverse of Group 1 Species 1, claims 1-17, in the reply filed on October 20, 2005 is acknowledged. Claims 18-91 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected Groups II, II and IV, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on October 20, 2005.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-17 are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. Patent Application Publication No. 2004/0087976 to DeVries et al.

**In regards to claim 1**, DeVries et al. disclose a surgical device for holding esophageal tissue during a fundoplication procedure, comprising: a proximal member having a vacuum port 95 connectable to a source of vacuum; a substantially flexible conduit 87 having a proximal end connected to the proximal member, the conduit having a lumen in fluid communication with the source of vacuum; and a distal member connected to a distal end of the conduit and configured to hold the esophageal tissue

when suction is supplied to the vacuum port from the source of vacuum (see paragraphs 0088-0096).

**In regards to claims 2-3,** Devries et al. disclose a surgical device, wherein the distal member defines at least one suction opening through which the esophageal tissue is to be held (see Figs. 26-27).

**In regards to claims 4,** Devries et al. disclose a surgical device, wherein the distal member comprises an elongate, curved plate and a concave insert 86, the plate and the insert engaged to form a space there between (see paragraph 0091).

**In regards to claim 5,** Devries et al. disclose a surgical device, wherein the elongate plate defines at least one suction 83 opening through which the esophageal tissue is to be held (see paragraph 0091).

**In regards to claims 6-7, 9,** Devries et al. disclose a surgical device, further comprising means 82 for grasping the esophageal tissue held by the suction, the means for grasping the esophageal tissue disposed proximate the suction opening.

**In regards to claim 8,** Devries et al. disclose a surgical device, further comprising a controller 98 for controlling the means for grasping the esophageal tissue.

**In regards to claims 10-11,** Devries et al. disclose a surgical device, wherein the jaw assembly includes a pair of jaws 82a and 82b attached to a flexible member 89 such that the pair of jaws move toward each other when the flexible member is deformed (see Figs. 27b-c).

**In regards to claims 12-16,** Devries et al. disclose a surgical device, wherein the actuation device comprises a cable extending from the distal member to the

proximal member, the cable attached to an axially movable member of the proximal member, such that an axial movement of the movable member causes the flexible member to deform (see paragraph 0095).

**In regards to claim 17,** Devries et al. disclose a surgical device, wherein at least a portion of the device is coated with polymer or elastomer material (see paragraph 0090).

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Matthew J. Kasztejna whose telephone number is (571) 272-6086. The examiner can normally be reached on Mon-Fri, 8:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Linda C.M. Dvorak can be reached on (571) 272-4764. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MJK  
11/2/05

*MK*

  
BEVERLY M. FLANAGAN  
PRIMARY EXAMINER